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IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: Bankruptcy Case No. 12-46534 MEH

PACIFIC THOMAS CORPORATION, dba
PACIFIC THOMAS CAPITAL, dba SAFE
STORAGE, CHAPTER 11

Debtor.

Date: 06/27/13
Time: 10:30 a.m.
Room: 215
The Honorable M. Elaine Hammond

KYLE EVERETT, CHAPTER 11
TRUSTEE,

Plaintiff,

v.

RANDALL WHITNEY aka RANDALL
C.M. WHITNEY aka RANDALL
WORSLEY aka RANDALL C.M.
WORSLEY, et al.,

Defendants.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
TRUSTEE'S MOTION TO SELL REAL
PROPERTY FREE AND CLEAR OF
CERTAIN INTERESTS**

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Other

H.R.Rep. No. 595, 95th Cong. 1st Sess. 345–346 (1977), U.S.Code Cong. & Admin.News 1978,
pp. 5963, 6301–03, Congressional Record Statements 11

L. King, Collier on Bankruptcy, ¶ 363.06[6][a], at 363–51 (15th ed. Supp.2004) 11

1 Pacific Trading Ventures, LTD., doing business as Safe Storage Management Company
2 (“PTVL”), a Nevada corporation, and V. Jill Worsley (collectively “Non-Debtors” and/or
3 “Responding Parties”) hereby file this Opposition to Chapter 11 Trustee Kyle Everett’s Motion to
4 Sell Real Property Free and Clear of Certain Interests (“Opposition”) as follows:

5 **I. BACKGROUND FACTS**

6 The above-captioned Chapter 11 case was filed on August 6, 2012. The debtor, PACIFIC
7 THOMAS CORPORATION (“Debtor” or “PTC”), operated the Chapter 11 as debtor-in-possession
8 until KYLE EVERETT (“Trustee”) was appointed Chapter 11 Trustee on January 16, 2013. PTVL
9 is a tenant of three properties that are owned by the Debtor as follows: (1) 2615 E. 12th Street, which
10 operates a self storage facility known as SAFE STORAGE with approximately 400 subtenants; (2)
11 1115 29th Avenue, which operates another self storage facility known as SAFE STORAGE with
12 approximately 350 subtenants; and (3) 2783 E. 12th Street, a portion thereof which is the sales office
13 for SAFE STORAGE (collectively “Self Storage Facilities”). (See Jill Worsley Declaration
14 [“Worsley Decl.”], ¶3.) The Debtor’s entire property consists of real property located at 2783 E. 12th
15 Street, 2615 E. 12th Street, 1111 29th Avenue, 1113-1115 29th Avenue, and adjacent as well as nearby
16 parking lots in Oakland, California (the “Subject Property”).

17 In January 2003, a management agreement was drafted between the Debtor and Non-Debtors.
18 (See Exhibit 1 to Complaint; Worsley Decl., ¶4.) The management agreement gave PTVL the
19 obligation to manage the Subject Property on behalf of the lessor Debtor, or the predecessor of
20 Everett. This management agreement was superseded by a lease that was entered between the Debtor
21 and PTVL in January 2005. (See Exhibit 3 to Complaint filed by Everett [hereinafter referred to as
22 the “2005 Lease”]; Worsley Decl., ¶5.) A draft version of this lease was prepared but was never used
23 by PTVL. (See Exhibit 4 to Complaint; Worsley Decl., ¶5.) Apparently, Exhibit 4 was discovered
24 by Everett when he reviewed the records of the Debtor. This unused lease stated that it was actually
25 entered on January 1, 2008, but this is a typographical error because, in Article 2 of Exhibit 4, the
26 term is for five years from January 1, 2005 and this was actually executed in 2005. (See Worsley
27 Decl., ¶5.)

28 Pursuant to the 2005 Lease (Exhibit 3 to Complaint), PTVL leased the entire Self Storage

1 facility and 1,500 square feet of the Morse Building located at 2783 East 12th Street, Oakland,
2 California for \$2,500 and the greater of \$22,500 or five (5) percent of net operating income proceeds,
3 which came out to be approximately \$25,000 per month. (See Worsley Decl., ¶7.)

4 On January 1, 2011 the management agreement was amended which applied to the other non-
5 storage facilities that PTVL managed on behalf of Debtor PTC, which did not supersede or void the
6 2005 Lease.

7 On the eve of bankruptcy, August 1, 2012, Debtor and PTVL entered into an amendment to
8 the 2005 Lease raising the rent from \$25,000 to \$70,000. (See Worsley Decl., ¶8.) The lease was
9 entered into with the understanding that Debtor would be operating a Chapter 11 bankruptcy and
10 operating the business, and there was no reason that Debtor would enter into this lease other than to
11 help the Chapter 11 estate. (See Worsley Decl. ¶8.)

12 **II. PROCEDURAL FACTS**

13 On April 11, 2013, the Trustee filed a Complaint against Responding Parties and Randall
14 Whitney (“Defendants”) for declaratory relief, accounting, turnover and injunctive relief, seeking
15 a determination of the validity of the leases between Debtor and PTVL. That same day, the Trustee
16 filed an Emergency Motion for Temporary Restraining Order and Order to Show Cause for
17 Preliminary Injunction which was set for hearing on April 26, 2013. On April 12, 2013, the Court
18 ordered a temporary restraining order against Defendants. At the April 26, 2013 hearing, the parties
19 entered into an agreement that was read into the record in open Court which addressed turning over
20 and/or reviewing business records and premises rents. Thereafter, the Court entered said order on
21 May 14, 2013.

22 On May 22, 2013, the Responding Parties filed their Answer (“Answer”) to the Trustee’s
23 Complaint. On May 30, 2013, the Trustee filed a Motion to Sell Real Property Free and Clear of
24 Certain Interests (“Motion”) seeking an order pursuant to 11 U.S.C. section 363(f)(4) to allow him
25 to sell the Subject Property free and clear of any interest in the Subject Property, including any
26 leasehold or possessory interest in the Subject Property claimed by PTVL which consists of the Self
27 Storage Facilities. However, the Trustee neglects to establish in his Motion that he is entitled to such
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1 relief, as he has failed to demonstrate that there is a bona fide dispute. Nor has he not provided for
2 any adequate protection for PTVL, and thus, it is not properly protected.

3 Accordingly, PTVL hereby objects to the Trustee's Motion because the Notice of the Motion
4 is defective on its fact and there is no bona fide dispute which would give authority for the Trustee
5 to sell the Subject Property free and clear under 363(f)(4). If the Court is inclined to grant the
6 Trustee's Motion over PTVL's objections, PTVL requests that the Trustee provide protection of its
7 interest, including holding at least \$1,400,000 in cash without any other lien attaching.

8 **III. ARGUMENT**

9 **A. The Notice of the Trustee's Motion Is Defective on its Face as it Fails to Identify the** 10 **Lienholders and Other Interest Holders Whose Property Rights Are Affected by the** 11 **Motion.**

12 Pursuant to Bankruptcy Local Rule 6004-1(a), "[a] motion to sell free and clear of liens under
13 11 U.S.C. § 363(f) shall identify by name, immediately below the caption, the lienholders and
14 other interest holders whose property rights are affected by the motion. The affected lienholders
15 and other interest holders shall be served with a complete set of moving papers pursuant to
16 Bankruptcy Rule 7004(b)." (Bold Emphases Added)

17 Here, the Notice of Motion is defective on its face as the Trustee fails to properly comply
18 with the United States Bankruptcy Court, Northern District of California's local rules by failing to
19 identify the lienholders and other interested holders, which include PTVL and its property rights
20 which are going to be affected by the Trustee's Motion. The rule specifically requires that a moving
21 party must state in the title of their Notice below the caption the party to which relief is directed. In
22 the absence of proper notice, an order approving the sale ordinarily will be void. (See *Matter of*
23 *Mooney Aircraft, Inc.* (5th Cir. 1984) 730 F2d 367, 37.) As such, the Notice is ineffective.
Accordingly, the Motion should be denied.

24 **B. Section 363(f)(4) Does Not Permit the Sale of the Property Free and Clear of the** 25 **Interest Where No Bona Fide Dispute Exists.**

26 The Trustee bases his Motion as against PTVL on the ground that there is a bona fide dispute
27 regarding the legitimacy of the 2005 Lease pursuant to section 363(f)(4). In support of his argument,
28 the Trustee contends that a bona fide dispute exists regarding PTVL's leasehold interest in the Self

1 Store Facilities based upon: (1) the filing of the Trustee's Adversary Proceeding against both PTC
2 and PTVL; and (2) the Declaration of Kyle Everett which the Trustee claims establishes a "bona fide
3 dispute." However, the Trustee's reliance on these arguments is misplaced for the following reasons
4 and as set forth below in more detail.

5 Section 363(f) of the Bankruptcy Code sets forth five alternative conditions that must be
6 satisfied for the Court to authorize a Debtor via a Trustee to sell its property free and clear of
7 interests of third parties, like PTVL.

8 Section 363(f)(4) of the Bankruptcy Code provides in pertinent part:

9 The trustee may sell property under subsection (b) or (c) of this section free
10 and clear of any interest in such property of an entity other than the estate, only
if ... (4) such interest is in bona fide dispute.

11 The term "bona fide dispute" is not defined in 11 U.S.C. § 363(f)(4). However, many courts
12 have stated that courts must determine "whether there is an objective basis for either a factual or
13 legal dispute as to the validity of the debt." *In re Busick*, 831 F.2d 745, 750 (7th Cir.1987); *In re*
14 *Octagon Roofing*, 123 B.R. 583, 590 (Bankr.N.D.Ill.1991). Courts utilizing this definition have held
15 the parties to an evidentiary standard; meaning that evidence must be provided to show factual
16 grounds that there is an "objective basis" for the dispute. Moreover, the Trustee has the burden of
17 establishing the existence of a bona fide dispute. *Scherer v. Fed. Nat'l Mortgage Ass'n (In re*
18 *Terrace Chalet Apartments, Ltd.)*, 159 B.R. 821 (N.D.Ill.1993); Although section 363(f) of the
19 Bankruptcy Code permitting a Trustee to sell estate property free and clear of any interest does not
20 define interest, leaseholds are such an "interest." *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281,
21 284-85 (7th Cir.2002).

22 The courts of the Ninth circuit have not yet considered whether a sale by a debtor/lessor
23 under § 363(f) terminates a tenant's leasehold. Various lower court cases are split on this issue.
24 Several courts in other jurisdictions have ruled that a lease may not be sold in a § 363(f) sale in an
25 attempt to evade a tenant's § 365(h) rights. *In re Haskell L.P.*, 321 B.R. 1 (Bankr.D.Mass.2005) *In*
26 *re Samaritan Alliance, LLC*, No. 07-50735, 2007 WL 4162918 (Bankr.E.D.Ky. Nov. 21, 2007).
27 Moreover, a recent court case decided this year determined that it was not possible for the Court to
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1 conclude that there was a "bona fide dispute" under § 363(f)(4) as to the validity of a Lessee's
2 leasehold interest on an objective basis. *In re Patriot Place Ltd.*, 486 B.R. 773 (Bankr. W.D. Texas,
3 2013)

4 In the present case, the Trustee argues that the Adversary Proceeding itself and his
5 declaration alone establishes a "bona fide dispute." However, there is no objective basis for either
6 a factual or legal dispute as to the validity of the dispute.

7 **1. The Adversary Proceeding Alone Is Not Sufficient Evidence That a Bona Fide**
8 **Dispute Exists at it Alleges Conclusory Allegations and Fails to Include Facts in**
9 **Support of Those Conclusions.**

10 The Trustee alleges that filing an Adversary Proceeding is sufficient evidence that a bona fide
11 dispute exists. However, the Adversary Proceeding does plead any factual grounds which would
12 indicate that there is a bona fide dispute. Rather, the Trustee has only plead conclusory allegations
13 without any facts in his Complaint supporting his claims against PTVL. The Trustee fails to include
14 facts that show how the 2005 Lease is allegedly null and void, nor does he plead facts that Debtor
15 PTC was involved in a scheme to deprive the Trustee of the ability to recover funds for the
16 bankruptcy estate of Debtor. The Trustee **does not plead** facts: (I) that PTVL concealed or
17 misrepresented the true status of income and expenses from the Self Storage Facilities, (ii) that
18 PTVL siphoned funds that the Trustee alleges properly belonged to Debtor's bankruptcy estate, or
19 (iii) that the 2005 lease was null and void (Emphasis added). What the Trustee relies on, instead, is
20 the conclusory assertion that PTVL has failed to turn over rents from the Safe Storage Facilities that
21 allegedly belong to PTC's bankruptcy estate, as the Trustee believes that the 2005 Lease was null
22 and void and was a sham created to siphon funds that properly.

23 Based upon these conclusions, there is no substantial evidence before this Court which shows
24 there is a bona fide dispute. Accordingly, the Trustee's Motion should be denied.

25 **2. The Trustee's Declaration Is Not Sufficient Evidence That a Bona Fide Dispute**
26 **Exists as it Is Riddled with Objectionable Evidence and Alleges Conclusory**
27 **Allegations.**

28 The Trustee argues that his Declaration establishes a bona fide dispute. The Trustee's
contentions are based upon three allegations alleged in the Motion which include: (1) The 2007

1 promissory note entered between Debtor and Summit, which is ambiguous, has hidden in the third
2 page under the paragraph entitled "Approval of Lease," language that states there are no tenants as
3 of July 16, 2007; (2) The Trustee contests the validity of the 2005 Lease and (3) the 2009 through
4 2011 income tax returns for Debtor show that the operations of the Subject Property were included
5 in Debtor's income tax returns. The Trustee would like there to be a dispute between the Trustee and
6 PTVL so he can sell the leasehold interest from PTVL right from under it. However, the Trustee's
7 reliance on these arguments are misplaced due to the reasons listed below.

8 **(i) the Trustee Fails to Allege Through His Declaration That the 2007**
9 **Promissory Note Proves PTVL Lied When the Note Was Executed.**

10 The Trustee does not specify what the issue is regarding the 2007 Promissory Note ("Note")
11 anywhere in his declaration under oath. Rather, the Trustee mentions generally in his Motion that
12 "Randall Whitney and Jill Worsely executed a Promissory Note dated July 27, 2007, on behalf of
13 borrower, PTC, that states: '[Summit] Bank to approve all lease and tenancies affecting the property,
14 and all documentation in connection to the leases entered into by Borrower prior to closing. Prior
15 to closing Borrower shall provide Bank, on Bank's form, executed estoppel certification and non-
16 disturbance and subordinations agreements form (sic) each tenants with the exception of self-storage
17 tenants if applicable. As of 7-16-07, Borrower does not have tenants.' (Emphasis added.)." The
18 Trustee states that a copy of the Note is attached as Exhibit "C" to the Trustee's declaration without
19 any explanation.

20 While not stated in his declaration or in the Motion, it is presumed that the Trustee is
21 claiming the 2005 Lease was null and void based upon the Trustee's belief that either Debtor and/or
22 Worsley lied when they executed the 2007 Promissary Note, as it stated that Borrower had no
23 tenants. However, there is no evidence before the Court which shows that Responding Parties lied
24 when the Note was executed in 2007 as the Trustee infers and would have the Court believe. Instead,
25 the Trustee argues through supposition in his memorandum of points and authorities that there was
26 some dispute.

27 Arguing the applicable facts in a memorandum of points and authorities is improper and
28 insufficient, because a memorandum of points and authorities does not constitute evidence. The facts

1 must be proven by declarations or other admissible evidence as part of the motion. California
2 Northern District Local Bankruptcy Rule 9013-1(d); affidavits and declarations must comply with
3 Federal Rule of Civil Procedure ("FCRP") 56(e).

4 In this case, the 2007 Promissory Note entered between Debtor and Summit, which is
5 ambiguous, has hidden in the third page under the paragraph entitled "Approval of Lease," language
6 which states there are no tenants as of July 16, 2007, although in that same paragraph, it excludes
7 SELF STORAGE tenants. The Note was written by Summit Bank, which was ambiguous. Any
8 ambiguities in a contract of adhesion must be construed against the drafter. *Meyers v. Guarantee*
9 *Sav. & Loan Assn.* (1978) 79 Cal.App.3d 307, 144 Cal.Rptr. 616.

10 Here, Worsley and PTVL interpreted the contract to mean that it did not have any tenants
11 other than the self storage tenants of PTVL. Obviously, the SELF STORAGE units had many tenants
12 at the time of the execution of the 2007 Promissory Note. Summit Bank was aware that there were
13 over 750 leases that PTVL had entered into with its tenants when it loaned the monies to Debtor.
14 Upon execution of the Summit Bank Note by Jill W. Worsley, she understood that there was no need
15 to provide the SAFE STORAGE lease because Denise Dodini, George Yang and Summit Bank were
16 aware of its existence and that SAFE STORAGE was excluded. (See Worsley Declaration In
17 Support of Opposition to Trustee's Injunction Motion, ¶9, Request for Judicial Notice of Worsley's
18 Declaration In Support of Opposition to Trustee's Injunction Motion per FRE 201).

19 Based upon the Trustee's arguing the facts in his memorandum and lack of factual support
20 in his declaration, there is no substantial evidence before this Court which shows there is a bona fide
21 dispute. Accordingly, the Trustee's Motion should be denied.

22 **(ii) The Trustee's Assertion in His Declaration Contesting the Validity of the**
23 **2005 Lease Does Not Prove That the 2005 Lease Is Invalid.**

24 The Trustee contests the validity of the 2005 Lease as alleged in his declaration which he
25 claims establishes a bona fide dispute. However, the Trustee's declaration is rife with inadmissible
26 hearsay, double hearsay evidence, lacks foundation and includes inadmissible opinion evidence.

27 In support of this opinion contesting the validity of the 2005 Lease, the Trustee mentions in
28 his declaration that PTVL admitted it filed an Answer to the Trustee's Complaint which

1 acknowledged that PTVL entered into the 2005 Lease (see ¶7 of Trustee Kyle Everett's Declaration)
2 and denied it had entered into a lease in 2008(See ¶8 of Trustee Kyle Everett's Declaration.) The
3 Trustee goes on to allege, in paragraph nine of his declaration, that he contests the validity of the
4 2005 Lease based upon his belief that PTVL instead serves as manager of the Self Storage Facilities
5 on Debtor PTC's behalf, as Jill Worsley is the Secretary of the Board of PTC and the Chief
6 Operating Officer of PTVL, that PTVL serves as the manager of PTC's Self Storage Facilities
7 through a Management Agreement dated as of January 9, 2003 which provides for PTVL to "serve
8 as the property manger of PTC's entire self storage facilit[ies]...", and that there is a 2011 Amended
9 Management Agreement which applies to all of the Self Storage Facilities. The Trustee does not
10 specify what the issue is regarding the 2005 Lease anywhere in his declaration under oath. Rather,
11 the Trustee claims in his Motion that the 2005 Lease is entirely inconsistent with the purported 2008
12 Lease. (See page 5, ¶6 of Trustee's Motion.)

13 A declaration or affidavit must: be based on personal knowledge; state "facts that would be
14 admissible in evidence (i.e., evidentiary facts, not conclusions); and show that the affiant is
15 competent to testify to the matters stated" (i.e., no inadmissible hearsay or opinions). (FRCP 56(e),
16 incorporated by reference in FRBP 7056 and made applicable to contested matters by FRBP 9014
17 (c)). Evidence is "hearsay" if it is a "statement" (or assertive conduct); made out-of-court—i.e.,
18 other than by a witness testifying at the current trial; offered to prove the truth of the matter asserted.
19 [Ev.C. § 1200(a); see also FRE 801(c).]

20 Here, paragraph 9(a) of the Trustee's declaration contains hearsay statements as set forth in
21 the objections filed concurrently herewith, as there is no competent evidence that refutes the fact that
22 there was originally a 2003 Management Agreement which was superseded by a 2005 Lease, which
23 Lease was amended on August 6, 2012. The Trustee's claim that PTVL currently serves as the
24 manager of PTC's Self Storage Facilities is not only factually incorrect, but it hearsay as it is an out-
25 of-court statement used to prove the truth of the matter asserted.

26 Paragraph 9(a) also contains statements that are irrelevant as set forth in objections filed
27 concurrently herewith, as the 2003 Management Agreement was superseded by the 2005 Lease. The
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1 2011 Amended Management Agreement that the Trustee's mentions, applies to the other non-storage
2 facilities that PTVL managed on behalf of Debtor PTC, which the Trustee failed to address in his
3 declaration. (See Worsley Decl., ¶7.) Instead, the Trustee states his belief that PTVL serves as
4 manager of Debtor PTC's Self Storage Facilities through an existing Management Agreement, which
5 has been shown to be superseded by the 2005 Lease.

6 While the Trustee does not clearly explain it in his declaration, the Trustee believes there is
7 an inconsistency between the 2005 Lease and the purposed 2008 Lease and the 2003 Management
8 Agreement and 2011 Amended Management Agreement, and based upon this inconsistency, the
9 2005 Lease of PTVL is invalid. However, this belief is an opinion. An opinion is an inference or
10 conclusion the witness draws from his or her observations. [*Wheeler v. St. Joseph Hosp.* (1977) 63
11 Cal.App.3d 345, 362.] Statements based solely on the declarant's opinions as to the facts generally
12 do not satisfy the personal knowledge requirement. The opinion evidence is inadmissible unless it
13 satisfies the prerequisites to receipt of opinion evidence by a witness testifying at trial. (Ev.C. §§ 800
14 & 801.) [*Estate of Huntington*, (1976) 58 Cal.App.3d 197, 209-210—declarant's statement regarding
15 possible meaning of term "descendants" in trust instrument excluded as inadmissible lay opinion.]
16 The Trustee is making a unilateral determination as to the possible meaning of the Leases and
17 Management Agreements.

18 Based upon the inadmissible hearsay statement, the irrelevant statements and inadmissible
19 opinion statements by the Trustee, there is no substantial evidence before this Court which shows
20 there is a bona fide dispute. Accordingly, the Trustee's Motion should be denied.

21 **(iii)The Trustee's Assertion in His Declaration That the 2010 Through 2011**
22 **Income Tax Returns for Debtor Show the Operations of the Self Storage**
23 **Facilities Were Included in Debtor's Income Tax Returns Does Not**
24 **Prove That the 2005 Lease Is Invalid.**

25 The Trustee does not specify what the issue is regarding PTC's 2010 through 2011 tax
26 returns ("Tax Returns") anywhere in his declaration under oath. Rather, the Trustee mentions
27 generally in his declaration and Motion that, based upon his review of Debtor PTC's 2010 through
28 2011 tax returns, the operations of the Self Storage Facilities were included in PTC's sworn income
tax statements. Though not stated clearly in the Motion or declaration, it appears the Trustee is

1 arguing that, based upon the Debtor using the operations figures of PTVL, then the Debtor falsely
2 included the operations of Subject Property into its 2009-2011 tax returns.

3 However, the Trustee's declaration is rife with inadmissible hearsay, hearsay upon hearsay
4 evidence, lacks foundation and includes inadmissible opinion evidence. First, the Tax Returns were
5 not prepared by PTVL or on behalf of PTVL. Rather, these Tax Returns were prepared on behalf of
6 Debtor PTC. Moreover, the statements made in the Tax Returns are for tax reporting purposes and
7 are not facts of what actually happened as to PTVL. Therefore, the Trustee's assertions are irrelevant.
8 Irrelevant evidence is not admissible. (See FRE 402; Ca. Evid. Code section 350.)

9 Secondly, and more importantly, the Trustee's statements as to Debtor PTC's Tax Returns
10 are hearsay as to PTC and hearsay as to PTVL and are, therefore, inadmissible. The Trustee
11 introduced this testimony for the sole purpose of proving, circumstantially, that if the rents from the
12 Self Storage Facilities belonged to PTVL, then Debtor falsely included the operations of the Subject
13 Property into its 2009-2011 tax returns. Testimony based on the out-of-court statements of third
14 parties is not admissible under the hearsay rule. *United States v. Brown*, 548 F.2d 1194, 1199 (5th
15 Cir. 1977).

16 Debtor's tax returns were completed by a CPA hired by Debtor, and while Debtor reported
17 the income as if there was no separate lease agreement, the CPA determined for tax purposes that
18 this was the appropriate method to account for the income and did not reflect the true business
19 structure. Moreover, and contrary to what Trustee asserts, there is no linkage in any of the Tax
20 Returns to any self storage business or SELF STORAGE entity, and there is nothing in the Tax
21 Returns which refers to any management agreements.

22 Based upon the inadmissible opinion statements by the Trustee, there is no substantial
23 evidence before this Court which shows there is a bona fide dispute. Accordingly, the Trustee's
24 Motion should be denied.

25 **C. If the Trustee's Motion to Sell Property Is Granted, PTVL must Be Adequately
26 Protected.**

27 If the Court decides to grant the Trustee's Motion over PTVL's objections, the Trustee must
28 adequately protect PTVL and condition relief on setting aside an appropriate amount to compensate

1 PTVL for the loss of the lease.

2 Subsection (e) of § 363 provides that, on request of an entity that has an interest in property
3 proposed to be sold, the court shall prohibit or condition a sale of property “as is necessary to provide
4 adequate protection of such interest.” Sales under § 363(f) are subject to the adequate protection
5 requirement. According to one leading commentator, “[t]his generally means that if, under applicable
6 law, the holder of the lien or interest could be compelled to accept a payment in exchange for its
7 interest, the trustee may take advantage of that right by replacing the holder’s lien or interest with
8 a payment or other adequate protection.” L. King, Collier on Bankruptcy, ¶ 363.06[6][a], at 363–51
9 (15th ed. Supp.2004). Adequate protection may be provided by cash payments, additional or
10 replacement liens, or such other relief as will result in the realization of the indubitable equivalent
11 of such entity’s interest in property. 11 U.S.C. § 361. “Most often, adequate protection in connection
12 with a sale free and clear of other interests will be to have those interests attach to the proceeds of
13 the sale.” H.R.Rep. No. 595, 95th Cong. 1st Sess. 345–346 (1977), U.S.Code Cong. & Admin.News
14 1978, pp. 5963, 6301–03, Congressional Record Statements. The Trustee must provide “adequate
15 protection” to PTVL under § 363(e) of the Bankruptcy Code if required.

16 Here, the Trustee has not offered or provided adequate protection for PTVL’s interest in the
17 lease. PTVL believes the value of its leasehold is interests is approximately \$1,000,000 million
18 dollars. (See Worsley Decl. ¶9.) Upon the sale, the Trustee should hold the amount realized from the
19 sale in escrow pending a determination by this Court of the relative interests of the Property without
20 any other lien attaching..

21 **III. CONCLUSION**

22 As set forth above, The Trustee has failed to demonstrate that there is a bona fide dispute
23 over PTVL’s interest in the Self Storage Facilities. Accordingly, for all of the foregoing reasons,
24 Responding Parties respectfully request that this Court DENY the Trustee’s Motion. Should the
25 Court be inclined to grant the Trustee’s Motion, Responding Parties respectfully request that this
26 Court order the Trustee to provide adequate protection and post the applicable portion of Responding
27 Parties’ leasehold interest from the proceeds with this Court as a condition of the sale.

1 Dated: June 13, 2013

Respectfully submitted,

2 DAVID M. STERNBERG & ASSOCIATES

3
4 By

David M. Sternberg

5 DAVID M. STERNBERG
6 Attorneys for PACIFIC TRADING
7 VENTURES, LTD.; PTLV, a Nevada
8 corporation; and V. JILL WORSLEY
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